permitting requesting carriers to rebundle UNEs to provide finished services, the Eighth Circuit confirmed that such considerations fall squarely within the FCC's jurisdiction. Thus, under Iowa Utils. Bd. v. FCC, the FCC has the jurisdiction to determine *when* the UNE and resale rates apply while the states have the jurisdiction to determine *what* the UNE and resale rates will be.[122] Any attempt to squeeze the definitional issues within the states' jurisdiction over pricing would eviscerate the FCC's authority to define UNEs under Section 251(d)(2).

3. BellSouth Violated Its Duty of Candor in Obscuring Its Position On UNE Unbundling.

The record as fleshed out by third party submissions in the South Carolina proceeding makes plain that BellSouth had failed to disclose important facts to the FCC. Its true position on recombined UNE pricing was obscured from the Commission in the application. This alone is sufficient grounds for dismissal.

BellSouth has indulged in further evasion and obfuscation in Louisiana. The BOC states that it will "perform all services necessary" and "will also perform network software modifications" necessary for CLECs to recombine UNEs.[123] But it also adds, without elaboration, that it is not under any duty "to provide

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[122] Of course, under BellSouth's interpretation, the incumbent would have the ability to force a competitive LEC to accept the wholesale discount for resold services simply by offering a service that is provided by the competitive LEC over UNEs. This would place the definitional issue within the jurisdiction of the *incumbent LEC*.

[123] See BellSouth Br. at 46.

every item needed by a CLEC to accomplish the combination."[124] It is impossible to know from this statement which necessary items BellSouth plans to withhold. Without more detail, of course, it is impossible for CLECs to determine whether UNE recombinations will be even theoretically feasible in BellSouth's region.

BellSouth also states that Section 251(c)(6), the collocation provision, "is the Act's only statutory authorization for CLEC entry into the premises of an incumbent LEC for the purpose of combining UNEs" and that the Commission "may not require further CLEC access to the central office or other facilities of incumbent LECs."[125] Again, it is impossible without further explanation to know what the implications of these statements are for UNE recombinations. No doubt BellSouth has left its position as vague as possible to permit maximum flexibility for resisting any arrangements that would actually make local competition possible. This form of cat and mouse game is intolerable.[126]

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[124] See id. Alphonso Varner adds that BellSouth "[i]nitial software modifications that are necessary for the proper functioning of CLEC-combined BellSouth unbundled network elements" will be offered at no charge. Varner Aff. at ¶ 67. Apparently CLECs will have to pay for subsequent software changes required for UNE recombination. It is not clear, however, what these software changes would be.

[125] See id. at 48.

[126] In testimony filed in the reply round of the FCC's South Carolina proceeding, several CLECs offered evidence that BellSouth's collocation offerings are completely inadequate for UNE recombination. See Walker Aff. at ¶¶ 6-12 submitted as an attachment to the reply comments of kmc Telecom Inc., CC Dkt. No. 97-208; Porter Aff. at ¶¶ 9-11, submitted as an attachment to the reply comments of WorldCom, Inc., CC Dkt. No. 97-208.

Sprint advocated to the Commission in its reply comments in the South Carolina application proceeding that the FCC should use this opportunity to warn all BOC applicants of the standards of truthfulness and candor to which these Section 271 applications will be held. BellSouth's vague statements in its Louisiana brief regarding the manner in which it intends to limit access to UNE recombinations only further demonstrates the need for a clear candor policy in 271 proceedings. No more warnings should be deemed appropriate. The brevity of the statutory period and the importance of the issues raised requires nothing less than full disclosure. This standard is the one applied to both common carrier and broadcast applicants before the FCC, and thus should be fully applied here as well. The failure to disclose thus constitutes independent grounds for dismissal.

An applicant is deemed to lack candor where it fails "to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited."[127] To constitute a lack of candor, an applicant need not be found to have affirmatively misrepresented the facts. In RKO General, Inc. v. FCC, the D.C. Circuit stated: "We need not decide whether RKO's pleadings were affirmatively misleading - *it is enough to find that they did not state the facts.*" [128] Therefore, omissions alone can lead to the

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[127] Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (quoting Silver Star Communications-Albany, Inc., 3 FCC Rcd. 6342, 6349 (Rev. Bd. 1988)).

[128] 670 F.2d 215, 230 (D.C. Cir. 1981), cert. denied, 457 U.S. 1119 (1982) (emphasis added). See also Garden State

disqualification of an FCC license application based on a finding of lack of candor.[129]

While these precedents have been developed largely in the Commission's responsibilities in broadcasting, they apply to all FCC applicants and thus remain apt here.[130] The need to insist on a high standard of honesty stems from the enormity of the processing tasks confronting the FCC. Because it must process tens of thousands of licenses, the FCC relies heavily on the "completeness and accuracy of the submissions made to it."[131] This reliance has prompted the Commission to insist that applicants inform the Commission of the facts needed for it to fulfill its obligations. Thus, Rule 1.65, holding each applicant "responsible for the continuing accuracy and completeness of information furnished in a pending application," applies to *all*

Broadcasting v. FCC, 996 F.2d 386, 389-90 (D.C. Cir. 1993)(ruling that withholding certain documents did not meet the high standard of candor).

129 See generally, R. Davis, Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit, Communications Law, 64 Geo. Wash. L. Rev. 946 (1996).

130 See In the Matter of TeleSTAR, Inc., 3 FCC Rcd 2860, 2866 (1988), affd. without opinion 886 F.2d 442 (D.C. Cir. 1989) (policies regarding applicant's character vary from broadcast to common carrier, but "those differences are not pertinent [where issues raised involve applicant's] relationship to the Commission and the integrity of the Commission's processes . . . . Lack of candor and misrepresentation are sufficient grounds for the adverse action here"). Also see In re: Application of Nancy Naleszkiewicz, 8 FCC Rcd 2777 (1993); In re: Revocation of Licenses of Pass Word, Inc., 76 FCC 2d 465 (1980).

131 RKO General, Inc. v. FCC, 670 F.2d at 232.

applications -- not only broadcast applications. The integrity of the 271 process deserves no lesser standard.

A high standard should be applied here for at least two reasons. First, as noted, the ninety day period which Congress has assigned to the Commission's review here is dramatically short, especially given the size of the record created and the public importance of the subject matter. This means that the FCC, and interested parties, should not have to doubt which part of the record might be true and which part -- whether by commission or omission -- untrue. Second, at least some part of the Commission's determination here requires predictive judgment as to future conduct by the applicant BOC, such as whether Section 272 compliance will occur, and whether the BOC will continue to provide interconnection and access to its network on a lawful basis. If the very application under consideration is not trustworthy, then the public can have no confidence that the *future* conduct of the applicant will be any better.

F. The FCC Has Jurisdiction Over The Terms And Conditions For UNE Recombination.

To further complicate matters, BellSouth also makes the statement that the terms and conditions under which CLECs may recombine UNEs fall under the states' jurisdiction.[132] This is simply wrong.

BellSouth relies on the Eighth Circuit's discussion of the FCC's Section 208 authority in the Iowa Utils. Bd. case in

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[132] See BellSouth Br. at 47.

support for its assertion. There, the Court held that states have the primary authority to accept, reject and enforce the terms of interconnection agreements (including ensuring compliance with the FCC's rules) and that parties may appeal state decisions solely to federal district court.[133] But this holding does not limit the FCC's jurisdiction over UNE recombination in three important respects.

First, even in the context of a state's review and enforcement of interconnection agreements, it must still follow the FCC's lead in defining UNEs.[134] As discussed, the Eighth Circuit has found that, inextricably intertwined with the task of defining UNEs, is the FCC's responsibility to ensure that "*any* requesting telecommunications carrier",[135] including those seeking to recombine, may rely on UNEs to provide telecommunications service. Thus, the FCC has the authority to establish rules mandating the UNE recombination provisions in interconnection agreements. The Eighth Circuit's ruling simply requires that the states and federal district courts enforce these rules.

Furthermore, the FCC has the authority to establish rules of general applicability requiring incumbent LECs to provide UNEs in a manner suitable for rebundling. The Eighth Circuit's restriction on FCC review of state actions under Section 208 applies only to interconnection agreements. Nothing prevents the

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133 See Iowa Utils. B. v. FCC, 120 F.3d 803-804.

134 See id. at 804.

135 See 47 U.S.C. § 251(c)(3) (emphasis added).

FCC from imposing (and enforcing) requirements on incumbents *in addition* to their obligations under interconnection agreements.

Finally, the Iowa Utils. Bd. decision also says nothing about the FCC's authority under Section 271. Especially with regard to issues over which Congress granted the FCC explicit jurisdiction under Section 251, the statute clearly allows the FCC to condition Section 271 approval on compliance with its rules. Thus, in virtually no sense do the states have jurisdiction over the terms and conditions of UNE recombination.

G. BellSouth Does Not Provide Interconnection In Compliance With Section 251(c)(2) Or The Commission's Rules.

Section 271(c)(2)(B)(i) establishes the checklist requirement that BOCs interconnect with CLECs for the transmission and routing of local exchange and exchange access traffic at any technically feasible point.[136] BellSouth is violating this requirement in Louisiana by refusing to exchange different kinds of traffic, except local and intraLATA toll, over the same interconnection trunks.[137]

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[136] See id. at § 271(c)(2)(B)(i) (requiring interconnection in compliance with Section 251(c)(2) which in turn requires incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access").

[137] See SGAT at I.D ("BellSouth and a CLEC shall establish trunk groups between interconnecting facilities. . . . Local and interLATA traffic only may be routed over the same one-way trunk group. Requests for alternative trunking arrangements may be made through the bona fide request process set out in Attachment B"). The LPSC refused Sprint's request that it be permitted to exchange different traffic types over the same interconnection trunks. See Sprint Arbitration Order

First, despite BellSouth's intimations in other contexts and the LPSC's findings in the Sprint arbitration,[138] there can be no question that the exchange of different kinds of traffic over the same interconnection trunks is technically feasible. In fact, BellSouth admitted as much in the Sprint arbitration proceeding in Florida.[139] The Florida PSC agreed and ordered BellSouth to provide mixed (local, toll and CMRS) traffic trunks for interconnection with Sprint.[140] As the Florida PSC found, there is simply no reason why the "Percent Interstate Usage" ("PIU") factors currently used by carriers to identify interstate and intrastate access minutes cannot be used identify local and wireless traffic as well. Indeed, as it has stated in the past, Sprint is willing to share any reasonably necessary billing records to ensure accuracy of traffic measures.

Nor is the LPSC's the final word on the issue in this proceeding. The FCC has the jurisdiction to require BellSouth to exchange interstate and CMRS traffic as well intrastate traffic

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at App. D Tab 4 at 8-9 (concluding that such arrangements are technically infeasible).

138 See Varner South Carolina Reply Aff. at ¶ 13, filed in CC Docket No. 97-208 (asserting that because of the "obvious complexity" involved, "combining several types of traffic on the same trunk group is not practical and creates allocation factors that can not be supported").

139 See Petition by Sprint Communications Company L.P. for arbitration, Final Order On Arbitration, Florida PSC Docket No. 961150-TP, 97 FPSC 9 at § VI ("Although BellSouth admits that Sprint's proposal [for exchanging different traffic types over the same trunk] is technically feasible, it opposes Sprint's offer for billing purposes").

140 See id.

over the same interconnection trunks. Where the exchange of CMRS and interstate toll traffic over the same trunks as intrastate traffic would be the most efficient arrangement, BellSouth's restricted offering implicates the FCC's jurisdiction to ensure adequate interconnection for CMRS and interstate toll carriers. It is well within the FCC's jurisdiction to require carriers to comply with its rules with regard to interstate traffic, even where compliance results in incidental FCC regulation of intrastate traffic.[141] Thus, at the very least the FCC may require mixed jurisdictional trunking in order to ensure adequate interconnection between LEC providers of interstate access and interstate toll providers under Section 201.[142]

In any case, the Commission has independent authority under Section 271 to determine whether BellSouth has complied with its checklist obligation to provide all forms of technically feasible interconnection.[143] Sprint has explained elsewhere that review of

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141 See New York Tel. Co. v. FCC, 631 F.2d 1059 (2nd Cir. 1980) (the FCC may establish rules prohibiting discrimination in local exchange prices charged to subscribers of interstate foreign exchange and common control switching arrangement services).

142 See Iowa Utils. Bd. v. FCC, 120 F.3d at 800 n.21 (holding that the FCC has jurisdiction to regulate incumbent LEC-CMRS interconnection arrangements). It is worth noting that, other than the rule requiring that incumbent LECs provide CLECs interconnection that is superior to that provided to the LEC itself, the FCC's rules implementing Section 251(c)(2) are still good law. See 47 C.F.R. § 51.305 (establishing FCC rules for interconnection under Section 251(c)(2); Iowa Utils. Bd. v. FCC, 120 F.3d at 819 n.39 (listing all rules vacated by the order).

143 This authority rests on the same basis as the Commission's independent authority over interconnection pricing under Section 271.

checklist issues by the Commission does not implicate the restrictions on FCC regulation of local interconnection arrangements.[144] The FCC's jurisdiction under Section 271 only implicates the BOC's request to provide in-region, interLATA service; it does not implicate the BOC's provision of local service. To the extent that interconnection arrangements are in fact subject to state jurisdiction, they can be brought into compliance with the FCC's Section 271 standards by state order, not FCC order.

Moreover, the restrictions placed on interconnection by BellSouth result in a violation of the Commission's Section 271 pricing rules. In the Michigan Order, the Commission stated that, to comply with this requirement, interconnection arrangements must be offered at TELRIC-based rates.[145] These limited offerings are likely to force CLECs to purchase interconnection for local traffic at prices set above TELRIC. Absent opportunities for efficient interconnection, CLECs would be forced to pay inefficiently high prices for the exchange of all traffic. It follows that interconnection for *local* traffic would be priced at rates above TELRIC in violation of the Commission's rules.

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144 See Intervenors' Opposition To Petitions For Writ Of Mandamus To Enforce The Court's Mandate, filed in Iowa Utils Bd. v. FCC, No. 96-3321 and Consol. Cases (8th Cir.) at 12-15 (describing basis for the FCC's independent authority to establish pricing rules for local interconnection under Section 271).

145 See Michigan Order at ¶ 289.

Thus, BellSouth appears to be preventing CLECs from interconnecting in the most efficient manner possible, not because of any technical limitation, but because it is trying to raise its rivals' costs. The Commission should therefore make it clear in this proceeding that the checklist requires that a BOC provide all forms of technically feasible interconnection to CLECs, including arrangements for the exchange of local, CMRS, intraLATA and interLATA traffic over the same interconnection trunks.

H. BellSouth Has Refused To Provide Numerous Checklist Items Based On Unfounded Claims Of Technical Infeasibility.

As the example of mixed traffic interconnection trunks demonstrates, one of the BOCs' most potent weapons in avoiding full compliance with the competitive checklist is the claim that a particular interconnection or unbundling arrangement is technically infeasible. Such claims are difficult for competitors to contest and regulators to evaluate since the incumbent possesses superior information about its own network. The Commission should therefore establish a rebuttable presumption that any interconnection or unbundling arrangement found by one state to be technically feasible is technically feasible throughout the BOC's region. The BOC may only rebut this presumption with specific facts demonstrating a material difference from the arrangement found to be feasible. Absent such a showing, failure to provide an arrangement based on a claim that it is infeasible should be deemed a violation of the relevant competitive checklist provision.

This approach to technical feasibility issues is consistent with the Commission's treatment of the issue in the Local Competition Order. There, the FCC determined that the phrase "technically feasible" in Section 251(c)(2) and (3) should be given the same meaning.[146] The Commission further held that successful implementation of an interconnection or access arrangement in one network was "substantial evidence" that the same arrangement would be technically feasible in another network.[147] Sprint's proposed feasibility presumption is simply an extension of that logic.

The state-by-state review of Section 271 checklist compliance offers a helpful check against the BOCs' endless claims of technical infeasibility. There are many instances beyond the mixed traffic interconnection context in which the presumption would prove useful. For example, in the First AT&T Arbitration Order, the LPSC rejected, apparently on technical infeasibility grounds, AT&T's request for unmediated access to BellSouth's advanced intelligent network ("AIN").[148] The South Carolina PSC, however, has specifically found that there is "no need for a mediation device," and ordered BellSouth to provide unmediated access to AIN triggers.[149] Similarly, BellSouth

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146 See Local Competition Order at ¶ 192.

147 See id. at ¶ 204.

148 See LPSC First AT&T Arbitration Order App. C-2 Tab 180 at 33-34.

149 See SCPSC AT&T Arbitration Order App. B Tab 69 at 9.

persuaded the LPSC that it was technically dangerous to permit AT&T to disconnect and ground the BellSouth wire when attaching its facilities to network interface devices ("NIDs") without excess capacity.[150] The SCPSC, however, saw through BellSouth's tactics and found this arrangement to be technically feasible.[151]

Not surprisingly, BellSouth refuses to provide arrangements in Louisiana that it has convinced the LPSC are technically infeasible, notwithstanding another state commission's conclusion that these same arrangements are feasible. This kind of gamesmanship should not be tolerated. BellSouth should not be deemed to have offered interconnection, unbundled loops or signalling in compliance with the checklist unless it provides specific evidence that the circumstances in Louisiana are sufficiently different to warrant a finding of technical infeasibility.[152]

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150 See LPSC Final AT&T Arbitration Order App. C-2 Tab 197 at 29.

151 See SCPSC AT&T Arbitration Order App. B Tab 69 at 10.

152 Nor can it be argued that the FCC lacks the authority to establish feasibility presumptions. Given the FCC's exclusive jurisdiction under Section 251(d)(2) to "determine what network elements should be made available" by the incumbents, the only possible jurisdictional issue would concern the application of the presumption to particular local interconnection arrangements. As discussed above, however, the FCC has independent jurisdiction under Section 271 to evaluate the extent to which a BOC is providing interconnection in compliance with the requirements of the Act.

III. BELLSOUTH HAS FAILED TO DEMONSTRATE THAT IT HAS COMPLIED WITH THE SEPARATE AFFILIATE SAFEGUARDS OF SECTION 272.

In its brief, BellSouth argues that "BST and BSLD need not conduct or report transactions in accordance with the requirements of Section 272 prior to receiving interLATA authorization and establishing BSLD as a Section 272 affiliate."[153] The BOC further asserts that "the Act does not empower the Commission to require full Section 272 compliance before the BOC applicant receives interLATA authorization."[154] This strained and illogical interpretation is easily rejected.

Sections 271 and 272 work in tandem to establish the conditions under which a BOC may provide in-region interLATA service. In pertinent part, Section 271(d)(3) states that "*[t]he Commission* shall not approve the [Section 271] authorization requested in an application . . . unless *it finds* that . . . the requested authorization will be carried out in accordance with the requirements of section 272. . . . The Commission shall *state the basis* for its approval or denial of the application."[155]

Section 271(d)(3) does not provide the FCC with guidance on how to make its finding. Nor does it limit the information upon which the FCC may rely to make its finding.

The broad language of Section 271(d)(3) would seem on its face to permit the Commission to review any relevant evidence to

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153 BellSouth Br. at 76.

154 Id. (emphasis in original).

155 47 U.S.C. § 271(d)(3) (emphasis added).

determine whether a BOC applicant will comply with the requirements of Section 272. Indeed, prohibiting the Commission from considering an applicant's past and present performance would essentially prevent the Commission from making any finding at all. Under such an interpretation, the BOC would only be required to recite the magic words that it would in the future comply with the statute and the Commission's rules. The Commission would be forced to accept this paper promise and look no further. It could also allow the BOC interLATA affiliate to unlawfully benefit, on a going-forward basis, from misconduct in the past (i.e., prior to Section 271 authorization), thereby allowing the very discrimination and cross-subsidization which the separate subsidiary provisions are designed to prevent.

At most, Section 271(d)(3) is ambiguous. The Commission's interpretation of the provision to permit consideration of past and present compliance with Section 272 is therefore permissible if reasonable.[156] As explained, the *only* reasonable interpretation of the statute is that it permits such a review.

BellSouth has itself recognized that in at least some instances "'past and present behavior' under applicable rules may be relevant to ensuring future compliance with section 272."[157] In an apparent attempt to hedge its bets regarding what the FCC

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156 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

157 BellSouth Br. at 76. In fact, BellSouth concedes that in some instances past and present behavior may be "highly relevant" to future Section 272 compliance. See id.

can and cannot rely upon to make its Section 271(d)(3) finding, BellSouth attempts to show past and present compliance with the FCC's rules and the requirements of Section 272.[158] This attempt, however, largely consists of unsubstantiated representations and indeed reveals that BellSouth has failed to comply with Section 53.203(a)(3) of the Commission's rules.

For example, the Jarvis affidavit states that BST provided facilities and staff to test BSLD equipment.[159] Yet, the Varner affidavit recognizes that a BOC and its Section 272 affiliate may not perform operating, installation, or maintenance functions associated with the other's facilities.[160] These statements appear inconsistent as providing facilities and staff to test equipment would seem to constitute either operation, installation, or maintenance of facilities. The Commission's rules prohibit a BOC or BOC affiliate, other than the Section 272 affiliate itself, from performing "any operating, installation,

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158 "[I]n order to provide the Commission with what it may deem 'relevant' information when assessing BellSouth's future compliance, BellSouth has included with its application descriptions of all transactions between BST and BSLD to date as well as of future services that may be provided." Id. (citation omitted).

159 See Jarvis Aff. at ¶ 14(c)(11) ("BST provided facilities, including SCPs and a Lucent #5ESS switch, and staff to test BSLD equipment"). The Jarvis affidavit submitted in support of BellSouth's Section 271 application for South Carolina made this point in a slightly more explicit way. See South Carolina Jarvis Aff. in CC Dkt. No. 97-208 at ¶ 14(c)(11) ("BST provided facilities and staff to test BSLD equipment including SCPs and Lucent #5ESS switch" at an amount totaling $42,800). While the Louisiana Jarvis affidavit is less clear on the point, it still seems to indicate that BellSouth has not complied with the Commission's rules.

160 See Varner Aff. at ¶ 231.

or maintenance functions associated with facilities that the BOC's section 272 affiliate owns or leases from a provider other than the BOC."[161] These restrictions were designed to avoid discrimination in favor of a BOC's 272 affiliate.[162]

BellSouth's performance in this regard presents an example of the potential for abuse under BellSouth's view of Section 272 compliance. If the FCC were not permitted to view past and present conduct during the Section 271 application process, nothing would prevent a BOC from using its employees, finances, and other resources to "start-up" the Section 272-affiliate prior to Section 271 approval. Discrimination and cross-subsidy could be achieved before the FCC would even have the chance to review the BOC's relationship with its long distance affiliate. Moreover, as the Justice Department's expert witness Dr. Marius Schwartz has explained, any attempt to remedy these problems after Section 271 approval has been granted is much less likely to be successful than pre-approval enforcement efforts.[163] This

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161 47 C.F.R. § 53.203(a)(3).

162 See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Dkt. No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, at ¶ 158 (noting that operational independence is required "to protect against the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate's competitors' operating less efficiently . . . ."") ("Non-Accounting Safeguards Order").

163 See Supp. Aff. of Marius Schwartz on Behalf of U.S. Department of Justice filed in CC Dkt. No. 97-208 at ¶¶ 36-40.

is especially true of technical discrimination. The only sensible approach therefore is for the Commission to establish compliance standards while the BOC still has the incentive to cooperate.

IV. BELLSOUTH'S APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST.

BellSouth has failed to comply with the very legal requirements which the FCC has found critical to the public interest in promoting local competition. The Commission should summarily dismiss the application without the need to discern and evaluate other public interest implications that may obtain.

Congress determined that no BOC should be allowed entry into the interLATA market within its region until it has relinquished its monopoly stranglehold over the local exchange markets on a state-by-state basis. Since this has not been done in Louisiana, it would violate the public interest to permit BellSouth in-region, interLATA relief in that State. To allow BOC entry prematurely would forego the anticipated benefits that flow from local telephone competition, and would diminish if not eradicate the extant consumer benefits of today's competitive long distance markets.

A. The Effects On the Local Market Alone Dictate the Conclusion that Relief Would Be Contrary to the Public Interest.

As the Commission has recognized, the prospect of interLATA entry is the incentive given by Congress to a BOC to induce its cooperation in opening its local monopoly.[164] Absent this

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[164] See Michigan Order at ¶ 23.

inducement, no BOC would rationally relinquish its bottleneck and voluntarily aid in bringing about competition.[165] BellSouth can do much more to lower entry barriers to its local markets; the public interest requires denial of the application until BellSouth fulfills its obligations.

1. The Commission has Expansive Powers Under the "Public Interest" Section of 271.

BellSouth reiterates (with perhaps some subtle differences) the arguments it pressed in its 271 application for South Carolina and in its reconsideration petition of the Michigan Order to narrow the reach of the Commission's public interest evaluation under section 271.[166] BellSouth states that "the Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist." [167] While BellSouth appears to argue that the

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[165] See Shapiro South Carolina Declaration at 3. As the FCC has found:

> incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.
>
> Local Competition Order ¶ 55.

[166] See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Dkt. No. 97-137, *Petition of BellSouth Corporation for Reconsideration and Clarification*, (rel. Sept. 18, 1997) ("BellSouth Petition for Reconsideration of Michigan Order").

[167] BellSouth Br. at 85.

Commission lacks the authority to evaluate the level of entry barriers in the local telephone markets in Louisiana, it nevertheless concedes that the FCC may "evaluate such matters as . . . the degree to which the checklist, section 272, and other regulatory safeguards constrain anticompetitive conduct in the interLATA market."[168] The presence of anticompetitive conduct as it effects local markets is apparently verboten, under this awkward interpretation.

The Commission must reject this caricature as it sacrifices the entire wisdom and value of administrative agency delegations by Congress. The "public interest" standard is used by Congress to provide an agency with the flexibility necessary to implement major goals and policy objectives within the agency's domain; it should be exercised accordingly.[169]

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[168] Id. at 86.

[169] The "public interest" is a hallmark of many regulatory statutes. See, e.g., Federal Power Act, 16 U.S.C. Section 24c (Federal Power Commission may authorize the issuance of a security by a public utility only "if it finds that such issue . . . is for some lawful object . . . and compatible with the public interest); Motor Carriers Act, Sections 10761(b), 10762(f) (allowing ICC to "grant relief" from filing requirements "when relief is consistent with the public interest and the transportation policy); Immigration and Nationality Act, 8 U.S.C. Section 1182(d)(5)(A) (permitting Attorney General "for reasons deemed strictly in the public interest" to parole into the United States any alien applying for admission); Federal Aviation Act, 49 U.S.C. 1429(a) (allowing FAA to suspend pilot's certification as required by safety in air transportation and the "public interest"); Interstate Commerce Act, 49 U.S.C. Section 11344(c) (permitting railroad mergers if consistent with the public interest). See also The Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990)(noting that SEC has the authority in registering an exchange or association of brokers to consider whether its rules "in

Of course, the scope of the Commission's public interest jurisdiction under section 271 is of academic value only here, where BellSouth has not complied with the checklist. Sprint therefore confines this discussion to a summary rebuttal of BellSouth's unduly narrow views of the public interest.

BellSouth's mischaracterization notwithstanding, the Supreme Court has described the term "public interest, convenience, and necessity" as a "supple instrument" granting broad powers to the FCC.[170] Those powers call for "imaginative interpretation"[171] and dispense "broad" authority to the FCC to act as an "overseer" and "guardian" of the public interest.[172] Courts are thus required to

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general . . . protect investors and the public interest)(citing 15 U.S.C. Sections 78f(b)(5), 78o-3(b)(6).

170 See Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)(the public interest serves as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy")). See also National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (holding that "public interest" confers broad powers upon the FCC); Public Utilities Com'n of Cal. v. FERC, 900 F.2d 269 (D.C. Cir. 1990)("public interest" standard grants broad powers to FERC).

171 See FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953)("The statutory standard [of the public interest] no doubt leaves wide discretion and calls for imaginative interpretation").

172 See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973). See also National Cable Television Ass'n v. United States and FCC, 415 U.S. 336, 341 (1974)("There is no doubt that the main function of the Commission is to safeguard the public interest"). See NAACP v. FPC, 425 U.S. 662, 669 (1976). Rather, the exact shape and breadth of an agency's public interest authority varies with the aims and goals of the statute in which the public interest provision is lodged. See id. at 669 (the public interest derives its "content and meaning" from "the purposes for which the Act[]

give "substantial judicial deference" to the Commission's "judgment regarding how the public interest is best served."[173]

The reach of the public interest is minimally defined by the policies inherent in the delegation of substantive law granted by Congress to the agency.[174] The shape and breadth of an agency's public interest authority varies with the aims and goals of the statute in which the public interest provision is lodged.[175] Here, of course, one of the principal policies established in the Telecommunications Act of 1996 is to effectuate the necessary and complex conditions that will allow for local telephone competition. One of the key provisions to implement this policy is to provide the reward of interLATA authority as an inducement to a BOC to cooperate in creating the conditions for a competitive local market in a particular state. To suggest that the Congress foreclosed to the FCC any ability to analyze the

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[was] adopted"); Public Utilities Com'n of Cal., 900 F.2d 269 at 281 (same). See also Western Union Div. v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949)("The standard of 'public convenience and necessity' is to be so construed as to secure for the public the broad aims of the Communications Act"), aff'd 338 U.S. 864 (1949).

173 See WNCN Listeners Guild, 450 U.S. at 596 (cites omitted).

174 See NAACP v. FPC, 425 U.S. 662, 669 (1976).

175 See id. at 669 (the public interest derives its "content and meaning" from "the purposes for which the Act[] [was] adopted"); Public Utilities Com'n of Cal., 900 F.2d 269 at 281 (same); see also Western Union Div. v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949)("The standard of 'public convenience and necessity' is to be so construed as to secure for the public the broad aims of the Communications Act"), aff'd 338 U.S. 864 (1949).

opportunities for local competition under Section 271 is simply absurd given this context.

The cases cited by BellSouth do not vary from this principle. Indeed, their facts demonstrate the breadth of the public interest concept by revealing how far the outer limits can be. In NAACP v. FPC, supra, the Court ruled that the FPC could not use its public interest authority to enforce civil rights legislation. In Business Roundtable v. SEC,[176] the court reversed the SEC's one-share, one-vote rule, finding that the agency could not justify it on its public interest authority because it went "so far beyond matters of disclosure" -- the subject matter of the Act -- and because it would invade the area of "corporate governance traditionally left to the states."[177] Here, the argument made by BellSouth is really not that the public interest does not reach matters of local market competition, but rather that its reach is cut off by the limitation found in Subsection 271(d)(4). BellSouth concedes that the FCC has some subject matter jurisdiction in the area for at least some purposes; its real quarrel lies in reconciling Subsection 271(d)(4) with 271(d)(C)(3).

Sprint believes that reading the sections in context with one another readily shows that the FCC may consider the openness of the local markets without violating the "may not extend" provision of (d)(4). Nothing in that language suggests an intent

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[176] 905 F.2d 406 (D.C. Cir. 1990).

[177] Id. at 413, 408.

by Congress to foreclose agency inquiry into the actual market effects of apparent checklist compliance.

The legislative history of the Act demonstrates that Congress was specifically aware that the Commission's public interest review under Section 271 would include consideration of issues relating to local competition. The Senate (whose bill in this respect was adopted) rejected an amendment proposed by Senator McCain which would have eliminated the Commission's authority to conduct a public interest review.[178] Senator McCain's amendment stripped out the public interest by providing that: "Full implementation of the checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement[s]."[179] The amendment was required, according to Senator McCain and other supporters, because the public interest standard would "negate[] the entire checklist"[180]

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[178] It is well-established that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." Rusello v. United States, 464 U.S. 16, 23-24 (1983). The Ninth Circuit has applied this rule specifically to the Communications Act. See Century Southwest Cable Television, Inc. v. CIIF Assocs., 33 F.3d 1068, 1071 (9th Cir. 1994) (rejecting argument that the 1984 Cable Act permitted a cable operator to provide service to apartment buildings against the wishes of the buildings' owners because the enacting Congress had dropped a proposal which would have authorized such actions).

[179] See 141 Cong. Rec. S7960 (daily ed. June 8, 1995). See also 141 Cong. Rec. S7954 (daily ed. June 8, 1995) (statement of Sen. McCain) (The FCC's public interest authority "should be eliminated, or at least amended so that compliance with the competitive checklist is deemed to be in compliance with the public interest test").

[180] 141 Cong. Rec. S7969 (daily ed. June 8, 1995) (statement of Sen. McCain). Senator Craig made similar statements. See,

as it was an "ill-defined, arbitrary standard" which would expand, rather than lessen, the Commission's authority.[181] In short, the amendment's backers believed that, without the amendment, the Senate bill permitted the Commission to use its public interest mandate to consider, when appropriate, issues relating to local competition that are not listed in the checklist. The amendment was, of course, defeated.

BellSouth's reliance in another context on the provision that prohibits the Commission from extending the checklist[182] is equally unconvincing. That provision would prevent the Commission from adding a new interconnection requirement, for example, the obligation to interconnect with information service providers, as a precondition for approval of all Section 271 applications. The prohibition against extending the checklist does not, however, prohibit the Commission from *considering*, as part of the public interest inquiry, other factors that *may* be

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id. at S7964-65 (statement of Sen. Craig) (The public interest standard would permit the Commission to "block" BOCs from offering interLATA services even if the BOC satisfied the competitive checklist).

181 See 141 Cong. Rec. S7960 (daily ed. June 8, 1995) (statement of Sen. McCain). See also id. S7966 (daily ed. June 8, 1995) (statement of Sen. Burns, R-MT.) (Public interest is in "the eye of the beholder."); id. at S7967 (statement of Sen. Thomas, R-WY.) ("The public interest is a vague and subjective standard."); id. at S7970 (statement of Sen. Packwood, R-OR.) (Public interest is "amorphous"); id. at S7965 (statement of Sen. Craig) (The public interest is "subjective" and "a standard that has no standard").

182 See BellSouth Petition for Reconsideration of Michigan Order at 11.